

DECISION



25164
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209767

DATE: May 17, 1983

MATTER OF: Kenneth L. Clark--Backpay--Computation on
Reinstatement to Duty

- DIGEST: 1. Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave.
2. Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied.

This decision is in response to a request by counsel on behalf of Mr. Kenneth L. Clark, a former employee of the Puget Sound Naval Shipyard, Bremerton, Washington, for review of our Claims Group's Settlement Certificate Z-2836175, dated June 7, 1982. By that settlement, our Claims Group held that there was no

025604

error in the computation of Mr. Clark's backpay, annual leave, or sick leave for the period of his involuntary separation. Our Claims Group also advised Mr. Clark that his claim for travel expenses incurred in connection with his appearances at the Merit Systems Protection Board's (MSPB) hearing should be filed with the Shipyard.

Upon review of the entire record, we modify our Claims Group's settlement in part to increase the period of time for which backpay is due, and we affirm the remainder.

The record shows that on January 20, 1980, Mr. Clark was removed from his position as a shipfitter at the Puget Sound Naval Shipyard due to excessive absenteeism. Mr. Clark appealed this action, and on June 11, 1980, the Seattle Field Office of the MSPB issued an initial decision which ordered Mr. Clark's separation canceled. The Department of the Navy petitioned the MSPB for review, but, by a decision dated December 19, 1980, the MSPB denied that petition. Mr. Clark returned to work on January 12, 1981, and worked until June 12, 1981. Mr. Clark thereafter applied for a disability retirement on August 14, 1981, which was approved by the Office of Personnel Management, effective December 2, 1981.

Mr. Clark claimed backpay for the full period of separation from January 20, 1980, to January 11, 1981. The Navy, however, did not award Mr. Clark backpay for that entire period. It was the Navy's contention, subsequently affirmed by our Claims Group, that Mr. Clark was not entitled to backpay for the period October 19, 1980, to January 11, 1981. This decision appears to be based partly on the fact that Mr. Clark refused a temporary appointment on October 17, 1980, and partly on a determination that Mr. Clark failed to provide sufficient evidence that he was medically capable of performing the duties of a shipfitter during that period.

On May 29, 1981, Mr. Clark filed a petition for enforcement with the Seattle Field Office of the MSPB. The Seattle Office, in a decision dated August 27, 1981,

informed Mr. Clark that his claims concerning the amount of backpay or other amounts allegedly due are to be resolved by the General Accounting Office rather than the MSPB.

Mr. Clark contends that throughout the period of his involuntary separation he was ready, willing, and able to perform his duties. The problem is that on May 16, 1980, Mr. Clark had submitted a workers compensation claim with the Department of Labor, Office of Workers Compensation Programs (OWCP), stating that he was permanently disabled for the position of a shipfitter. Based upon this information, in offering him a temporary position pending its appeal of the Field Office decision, the Navy advised Mr. Clark that he would have to undergo a fitness-for-duty examination. Although he indicated his willingness to accept temporary employment, Mr. Clark refused this offer since he feared that the Navy would use the examination results to his detriment in the appeal pending before the MSPB, and his application for compensation before the OWCP. As a result, the Navy determined that Mr. Clark was no longer ready, willing, and able to work as required by 5 C.F.R. § 550.805(c)(1) (1982), and, therefore, was not entitled to backpay for the period October 19, 1980, to January 11, 1981. From the record it appears that Mr. Clark was not required to submit to a physical examination prior to returning to work on January 12, 1981.

Section 5596 of Title 5, United States Code (1976) states that an employee who has undergone an unjustified or unwarranted personnel action:

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action

had not occurred, less any amounts earned by the employee through other employment during that period * * *."

In Schwartz v. United States, 149 Ct. Cl. 145 (1960), the United States Court of Claims construed a similar statutory provision as requiring a claimant to secure other employment and requiring that the amount which the claimant earned or with reasonable effort could have earned is to be deducted from the total amount which would otherwise be due. This duty to mitigate, however, is somewhat limited. The court in Schwartz held that the employee was under no obligation to seek other employment while appellate administrative proceedings are in progress, and the employee is endeavoring to obtain reinstatement. The court found that the employee should be afforded ample opportunity to prepare for the hearings dealing with the agency's action. Id. at 148; See also Power v. United States, 220 Ct. Cl. 157, 168 (1979).

Our Office has concurred in this interpretation. In 41 Comp. Gen. 273 (1961), we considered a case where the employee was wrongfully separated, and, after a hearing, was ordered to be restored to duty, but the agency appealed the order. We held that the employee had reasonable grounds for not making an effort to secure other employment during the period of the separation, including both time awaiting the hearing and awaiting final decision. Although the employee in that case was not offered employment by the agency during the pending appeal, we find that the rationale of that decision also applies to the present case. If an employee, while not forced to seek work, is required to accept work if it is offered by the agency, the employee will no longer have the time to adequately prepare for any hearings contesting the agency's action. In any event, we note that the Navy in this case only offered Mr. Clark an unspecified temporary position which was conditioned upon the passing of a physical examination. Under these circumstances, we find that Mr. Clark was not obligated to accept the temporary employment offered by the Navy Department, since for the entire period of his separation he was either awaiting a hearing or awaiting a final decision on the agency's appeal. Consequently, the denial of backpay to Mr. Clark

for the period October 19, 1980, to January 11, 1981, cannot be justified on the basis that Mr. Clark's refusal of temporary employment was unreasonable. Mr. Clark was under no obligation to accept the offer.

Although Mr. Clark was not required to seek alternate employment during the administrative appeal period, he may not receive backpay for any period during which he was not ready, willing, and able to perform his duties because of an incapacitating illness or injury. 5 C.F.R. § 550.805(c)(1) (1982). The Back Pay Act is designed to compensate employees for the pay they would have earned but for the wrongful separation, and if the employee is incapable of performing the work, he has lost nothing. Everett v. United States, 340 F.2d 352 (Ct. Cl. 1965).

It is well established that the employee bears the burden of showing that he is ready, willing, and able to work in order to demonstrate his entitlement to backpay. United States v. Wickersham, 201 U.S. 390 (1906); Seebach v. United States, 182 Ct. Cl. 342 (1968); Graves v. United States, 176 Ct. Cl. 68 (1966). Our Claims Group determined that Mr. Clark failed to provide sufficient evidence for the period October 19, 1980, to January 11, 1981, showing that he was medically capable of performing his duties. However, we find nothing in the record which indicates that Mr. Clark's medical condition during the period October 19, 1980, to January 11, 1981, differed in any way from his medical condition during the period for which Mr. Clark was awarded backpay, or during the periods before his separation or after his reinstatement. In essence, the Navy award of backpay to Mr. Clark for the period January 12, 1980, to October 17, 1980, is an implicit finding that Mr. Clark was ready, willing, and able to perform his duties during that period. The record fails to disclose any affirmative evidence which would justify a finding that Mr. Clark would have been medically incapable of performing his duties for the remaining period of his separation.

Furthermore, the fact that Mr. Clark filed a disability application with the OWCP claiming a permanent disability is not dispositive of Mr. Clark's medical

condition. It appears that Mr. Clark received no disability benefits during the entire period of his separation. Cf. Cunningham v. United States, 212 Ct. Cl. 451 (1977). Also, the application was filed on May 16, 1980, and indicates that the injury which forms the basis for Mr. Clark's disability claim occurred on December 14, 1978. Neither fact supports the finding that Mr. Clark was medically incapable of performing his duties during the period October 17, 1980, to January 11, 1981. Finally, we note that Mr. Clark has contended throughout the period of his separation that he was ready, willing and able to work, and that, in fact, Mr. Clark did report to duty on January 12, 1981, did not take a physical examination, and worked without limitations until June 12, 1981.

On the basis of this evidence, we find that the denial of backpay to Mr. Clark for the period October 19, 1980, to January 11, 1981, cannot be sustained. Accordingly, our Claims Group decision is modified and Mr. Clark is entitled to an additional award of backpay for the period October 17, 1980, to January 11, 1981, with appropriate adjustments in annual and sick leave for that period.

Mr. Clark also disagrees with the formula applied by the Navy in determining his entitlement to overtime pay for the period of his separation. Under 5 U.S.C. § 5596, Mr. Clark is entitled to the pay he "normally" would have received, and this includes an estimate for the overtime work Mr. Clark would have performed but for the wrongful separation. However, there is no specific formula which is appropriate in all situations. We have held that the term "normally" suggests at least an administrative finding in each case that the facts support a reasonable probability that the employee would have performed duty for which compensation is payable. William R. Simoneau, B-198485, August 27, 1980; B-177315, December 12, 1972; B-163142, February 28, 1968.


In this case, the Navy awarded Mr. Clark overtime for the period of his wrongful separation based on the number of overtime hours he worked in 1979. It was determined

that Mr. Clark was entitled to 8 hours of overtime for the period of his wrongful separation. Based on the evidence presented, we cannot say that the agency should have reached a different conclusion or utilized a different formula. Since we do award Mr. Clark backpay for an additional period, we find that Mr. Clark is entitled to have his overtime award recomputed to reflect this fact. However, in all other respects, Mr. Clark's claim for additional overtime is denied.

Mr. Clark argues that his award of overtime pay should be based on the overtime hours worked by other shipfitters during the time he was separated, rather than on the overtime he worked during the preceding year. He states that his overtime work for that year was limited because of his physical problems. However, since the record seems to show that his physical condition remained about the same during his separation as it had been the preceding year, it is not unreasonable to assume that his overtime would have been similarly restricted.

Mr. Clark has also claimed travel expenses in connection with his appearances at the MSPB. In this regard, we point out that there must be sufficient evidence to establish the validity of a claim against the Government before it can be paid. See 18 Comp. Gen. 980 (1939), 53 Comp. Gen. 181 (1973). Mr. Clark has not filed the appropriate forms to substantiate his claim. Consequently, we have no basis upon which to consider this claim. Mr. Clark, if he wishes to pursue this claim, should file the appropriate forms with the Puget Sound Naval Shipyard.

Accordingly, a settlement will be made in the amount found due for the payment of additional backpay to Mr. Clark.

for 
Comptroller General
of the United States